(2)

NO. 90-274

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TEAMSTERS LOCAL UNION NO. 776,
*Petitioner,*

v.

RITE AID CORPORATION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Petitioner has demonstrated the requisite special and important reasons warranting review on writ of certiorari, where the Court of Appeals' judgment affirming the district court was in accordance with well-established precedent holding that arbitration awards will not be enforced when they are in direct conflict with decisions of the National Labor Relations Board (NLRB)?

2. Whether the Petitioner may contend on appeal that Respondent failed to timely move to vacate the arbitration award pursuant to state law, when that contention was never raised before the district court?

## RULE 29.1 LISTING

Respondent has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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## STATEMENT OF THE CASE

The facts in this matter have been adequately set out in the district court's opinion below. In brief, a dispute developed between the parties over the scope of their contractual collective bargaining unit, i.e., whether it included the employees in the newly-established Central Returns Warehouse (CRW), located in Shiremanstown, Pennsylvania. The CRW operation is located in a building several blocks away from Rite Aid's Central Distribution Center (CDC), the employees of which are included within the collective bargaining unit.

After the Union filed several grievances under the collective bargaining agreement (referred to hereafter as the Agreement), the Union filed for arbitration of the grievances. An arbitration hearing was subsequently conducted by Arbitrator Ira F. Jaffe, who on July 14, 1988, issued a decision sustaining the Union's grievances and determining that the CRW employees should be included in the same bargaining unit as the CDC employees. The arbitrator further determined that the CRW employees (then numbering approximately 27) must pay dues and initiation fees to the Union and be bound by all provisions of the Agreement (including Article III which requires union membership as a condition of continuing employment).

Recognizing that the arbitrator had improperly treaded upon the exclusive authority of the National Labor Relations Board (NLRB) to determine the appropriate bargaining unit, Rite Aid then filed a unit clarification petition with the NLRB, seeking a determination as to the proper status of the CRW employees. After several days of hearings and the filing of briefs by both parties, the NLRB Regional Director issued his Decision And Order in Case 5-UC-275, agreeing with Rite Aid that the CRW employees could not lawfully be considered

part of the contractual bargaining unit. The Regional Director's order (supported by a five-page analysis) was as follows:

ORDER

> IT IS HEREBY ORDERED that the collective bargaining unit set forth in the Agreement be, and, it hereby is, clarified to exclude from it all employees in the Employer's Central Returns Warehouse in Shiremanstown, Pennsylvania.

The Regional Director also squarely rejected the Union's contention that the arbitrator's award was controlling:

> Although the Board encourages deferral in appropriate cases, it is well settled that the Board refuses to defer to an arbitrator's decision in determining questions of representation, accretion, or appropriate unit. Pinkerton's Inc., 270 NLRB 27, at fn. 1 (1984); Williams Transportation, 233 NLRB 839 (1977). I am, therefore, refusing to defer to the Arbitrator's Decision and Award in regard to the representational status of the employees who are subject of this petition. The Union's Motion to Dismiss is, therefore, denied.

Not content with the Regional Director's Decision And Order, the Union exercised its right to file a Request For Review of that decision with the National Labor Relations Board in Washington, D.C. By Order dated April 28, 1989, the Board denied the request for review.

The Union then filed a Motion for Reconsideration with the Board, which was denied on May 24, 1989. The Union next filed a Request for Leave to File Appeal, which the Board denied on June 9, 1989.

The Union had also filed an unfair labor practice charge against Rite Aid with the NLRB, Case 5-CA-19968, dated September 6, 1988. The Union alleged therein that Rite Aid had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (5), by refusing to abide by the arbitrator's decision and by not applying the terms of the Agreement to the CRW employees. The NLRB rejected the Union's contentions, and on June 6, 1989, issued a decision dismissing the Union's charges.

On May 15, 1989, Rite Aid filed an unfair labor practice charge with the NLRB in Case 5-CB-6292, alleging that the Union had violated Sections 8(b)(1)(A), (2), and (3) of the Act, 29 U.S.C. §158(b)(1)(A), (2), and (3). On June 29, 1989, the Board's Regional Director issued a Complaint and Notice of Hearing in Case 5-CB-6292, alleging that by continuing to seek judicial enforcement of the arbitration award in the instant matter, after the Board had already determined that the CRW employees could not be lawfully included in the bargaining unit, the Union has unlawfully attempted to force Rite Aid to bargain with the Union in an inappropriate bargaining unit and has restrained or coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, 29 U.S.C. §157. That matter is currently pending before the Board on a motion for summary judgment by the Board's General Counsel.

On January 5, 1989, the Union filed a complaint in the United States District Court for the Middle District of Pennsylvania, seeking enforcement of the arbitration award. On September 29, 1989, the court granted summary judgment in favor of Rite Aid and against the Union. The court concluded that this matter involved a representational issue, i.e., the scope of the parties' collective bargaining unit, and that therefore the decision of the NLRB must control over the

conflicting arbitrator's award, citing this Court's well-established holding in Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed.2d 320 (1964). The district court also held that the arbitrator impermissibly strayed beyond interpreting the collective bargaining agreement, thereby exceeding his authority.

On October 25, 1989, the Union appealed the district court's order to the United States Court of Appeals for the Third Circuit, which denied the appeal in an unreported judgment order dated April 9, 1990. The Union thereafter filed a petition for rehearing, which was denied by the court en banc on May 21, 1990.

## REASONS WHY THE PETITION SHOULD BE DENIED

I. There Are No Special And Important Reasons Warranting Review On Writ Of Certiorari, Where The Opinion Below Was In Accordance With Well-Established Precedent Holding That Arbitration Awards Will Not Be Enforced When In Direct Conflict With Decisions Of The National Labor Relations Board (NLRB).

The Petitioner has failed to show that there are special and important reasons which would warrant consideration by this Court on writ of certiorari, as required by Rule 10 of the Rules of the Supreme Court of the United States. While Petitioner alleges that the decision below conflicts with decisions from both this Court and other decisions of the Court of Appeals for the Third Circuit, further analysis discloses no such conflict.

It is a well-established principle in federal labor law, duly noted by the district court below, that judicial review of an

arbitrator's interpretation of a collective bargaining agreement is limited. As long as the award "draws its essence from the collective bargaining agreement," the award generally should be confirmed. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed.2d 1424 (1960).

However, if the arbitration award is contrary to a well-defined public policy, the award is unenforceable. See W. R. Grace and Co. v. Local Union 759, Int'l. Union of United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed.2d 298 (1983). The National Labor Relations Act constitutes such a well-defined public policy. See, e.g., Perma-Line Corp. of America v. Sign Pictorial and Display Union, Local 320, 639 F.2d 890, 894-95 (2d Cir. 1981); General Warehousemen and Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282, 1292 (5th Cir. 1978), cert. dismissed, 441 U.S. 957, 99 S. Ct. 2420, 60 L. Ed.2d 1075 (1979); Local 7-210, Oil, Chem. & Atomic Workers Int'l. Union v. Union Tank Car Co., 475 F.2d 194, 197 (7th Cir.), cert. denied, 414 U.S. 875, 94 S. Ct. 68, 38 L. Ed.2d 120 (1973). The Court of Appeals for the Third Circuit has previously held that an arbitration award may be vacated if it is violative of the National Labor Relations Act. Arco-Polymers, Inc. v. Local 8-74, a/w Oil, Chem. and Atomic Workers Int'l. Union, 671 F.2d 752, 754 n.1 (3d Cir.), cert. denied, 459 U.S. 828, 103 S. Ct. 63, 74 L. Ed.2d 65 (1982).

Under Section 9(b) of the Act, 29 U.S.C. §159(b), only the National Labor Relations Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." This section of the Act confers broad discretion on the Board to determine appropriate bargaining units, and a

reviewing court of appeals will defer to the Board's determination unless it is arbitrary or capricious. See, e.g., Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978).[1/]

It is not uncommon for an arbitration award and NLRB determination to be in conflict with each other. However, when this occurs, the Board's decision is controlling, pursuant to this Court's "supremacy doctrine".

In Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272, 84 S. Ct. 401, 409, 11 L. Ed.2d 320 (1964), the Supreme Court enunciated its "supremacy doctrine" as follows:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under §301.... The superior authority of the Board may be invoked at any time.

See, also, Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1278-79 (9th Cir. 1984), cert. denied, 471 U.S. 1015, 105 S. Ct. 2018, 85 L. Ed.2d 300 (1985) ("Carey

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[1/] NLRB orders are generally reviewed by the courts of appeal, not the district courts, pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§160(e) and (f). This Court has long recognized that it is the Board, not the courts, which has primary authority to hear and resolve disputes over representation issues. South Prairie Constr. Co. v. Local No. 627, Int'l. Union of Operating Eng'rs., 425 U.S. 800, 805, 96 S. Ct. 1842, 48 L. Ed.2d 382 (1976) (per curiam).

indicates that, while the possibility of a subsequent decision by the Board does not prevent arbitration of certain representational issues in a Section 301 proceeding, where the findings of the Board and an arbitrator conflict on a particular issue, the Board's decision must take precedence."); Sea-Land Service, Inc. v. International Longshoremen's Ass'n., 625 F.2d 38, 43 n.7 (5th Cir. 1980) (a conflicting NLRB decision "...will defeat...any suit for enforcement of the...contrary award."); International Org. of Masters, Mates & Pilots v. Trinidad Corp., 803 F.2d 69, 72 (2d Cir. 1986) ("...it is clear that an arbitrator's award repugnant to the NLRA will not be enforced."); A. Dariano & Sons, Inc. v. District Council of Painters, 869 F.2d 514 (9th Cir. 1989) ("It is uncontroverted that the supremacy doctrine announced in Carey establishes that an NLRB decision on a representational issue overrides an arbitrator's decision on the same issue.").

Having established that the Board's decision must take precedence over a conflicting arbitrator's ruling, it cannot be denied that the two rulings in this matter conflict with each other. The arbitrator purported to apply "traditional labor law standards" in his analysis (Arbitration Decision, Petitioner's Brief at A-30). He then found that a bargaining unit including both CRW and CDC employees was an appropriate unit, "...after consideration of the traditional community of interest standards used by the NLRB in such cases...." (Id., A-33). He further found that application of the Agreement to the unrepresented CRW employees would not violate their right to remain unrepresented by a labor organization, a right guaranteed by Section 7 of the Act, 29 U.S.C. §157. Id. His award directs Rite Aid to "...treat the employees performing th[e] returns work as covered by the terms and conditions of employment contained in the Agreement...," and he further provides the Union with a financial windfall of retroactive dues and initiation fees for each CRW employee. (Id., A-34).

Obviously the NLRB, having applied its expertise in determining appropriate bargaining units, disagreed with the arbitrator. Finding that only 15 to 20% of the CRW work was previously performed at CDC, and noting (1) a lack of common direct supervision of CRW and CDC employees, (2) no evidence of interchange between the employees of the two facilities, (3) separate lunchrooms and parking lots for each facility, (4) different accounting and payroll systems, and (5) no layoffs or reductions in hours for CDC employees as a result of the establishment of CRW, the NLRB concluded that the CRW employees were not part of the bargaining unit described in and covered by the Agreement.

This reluctance by the Board to force union representation upon employees who have not voted for representation by that union in an NLRB-conducted secret ballot election is a policy preference well supported by the reviewing courts of appeal. NLRB v. Paper Mfrs. Co., 786 F.2d 163 (3d Cir. 1986); Towne Ford Sales, 270 NLRB 311, 116 LRRM 1066 (1984), aff'd., 759 F.2d 1477 (9th Cir. 1975); NLRB v. Stevens Ford, Inc., 773 F.2d 468 (2d Cir. 1985). This policy is grounded in the protections afforded to employees by Section 7 of the Act, 29 U.S.C. §157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing... and shall also have the right to refrain from any or all such activities....") (emphasis added).

The conflict between the arbitration decision and the NLRB determination in this matter is irreconcilable. As the NLRB has held that the existing bargaining unit cannot lawfully include CRW employees, there can be no lawful application of the terms of the Agreement to those employees. Enforcement of the arbitration award would require Rite Aid to recognize the Union as the representative of employees

who have never expressed an interest in union representation.[2/] Indeed, it is itself an unfair labor practice, under Section 8(a)(1) and (2) of the Act, 29 U.S.C. §§158(a)(1) and (2), for an employer to subject non-bargaining unit employees to a collective bargaining agreement, particularly where that agreement requires them to join the union as a condition of keeping their jobs (as does the Agreement in this matter at Article III). See, e.g., United States Steel Corp., 280 NLRB 837, 123 LRRM 1309 (1986) (employer acted unlawfully when it extended contract covering truck drivers to a warehouse unit since latter employees lacked sufficient community of interests to be accreted to truck driver unit); Safeway Stores, Inc., 256 NLRB 918, 919, 107 LRRM 1338 (1981) (employer and union representing grocery store bakery department employees acted unlawfully when they agreed to

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[2/] Enforcement of the arbitration award in this matter would require Rite Aid to apply the collective bargaining agreement to employees whom the Board has already determined to be outside the scope of the parties' collective bargaining unit. The arbitrator, by the terms of his award, clearly made this dispute "representational," in that the question of the identity of the CRW employees' collective bargaining representative, if any, is squarely at issue. "Contractual rights cannot exist separately and apart from the union's right to represent the unit." Local 7-210, Oil, Chem. & Atomic Workers v. Union Tank Car Co., supra, 475 F.2d 194, 199; see also United Glass and Ceramic Workers v. NLRB, 463 F.2d 31, 36 (3d Cir. 1972); Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1277 (9th Cir. 1984). Once the NLRB has resolved the dispositive representational issue, the courts will not enforce a conflicting arbitration award. Smith Steel Workers v. A. O. Smith Corp., 420 F.2d 1, 7 (7th Cir. 1969); Local Union 204, IBEW v. Iowa Elec. Light and Power Co., 668 F.2d 413, 419 n.11 (8th Cir. 1982).

apply their contract to employees in new delicatessen department, thereby interfering with Section 7 rights of employees); Sun-Maid Growers of California v. NLRB, 618 F.2d 56 (9th Cir. 1980) (treating newly hired electricians as accretion to machinists bargaining unit violative of the Act as new employees denied opportunity to choose their bargaining representative).

Notwithstanding the above, the Union has argued that the decision below conflicts with Tanoma Mining Co. v. Local 1269, 896 F.2d 745 (3d Cir. 1990), where the Court of Appeals reversed the lower court's refusal to enforce an arbitration award. The award in that case, however, was not even alleged to be contradictory to a determination by the NLRB, and thus the Union's citation to Tanoma Mining is woefully inapposite. Similarly, while the Union's Petition in this matter purports to allege that the decision below conflicts with "well settled decisions" of the Supreme Court (Petition, p. 5), no such cases are cited in the body of the petition.

It is obvious that the Union cannot meet its burden of showing conflict between the decision below and any other authority, and therefore the petition should be dismissed.

## II. The Petitioner May Not Properly Contend On Appeal That Respondent Failed To Timely Move To Vacate The Arbitration Award, When That Contention Was Never Raised Before The District Court.

It is well established that a federal appellate court will generally refuse to consider issues that are raised for the first time on appeal, absent exceptional circumstances. See 2 Fed. Proc., L. Ed. §3:645. A district court should not be reversed on grounds that were never urged or argued in the court

below, unless an extreme injustice would result. Caisson Corp. v. Ingersoll-Rand Co., 622 F.2d 672, 680 (3d Cir. 1980); Newark Morning Ledger Co. v. United States, 539 F.2d 929, 932 (3d Cir. 1976); Cady v. Twin Rivers Towing Co., 486 F.2d 1335 (3d Cir. 1973); Walker v. Sinclair Refining Co., 320 F.2d 302 (3d Cir. 1963); Cf. Trailways Lines, Inc. v. Trailways Union, 785 F.2d 101 (3d Cir. 1986), cert. denied, 479 U.S. 932, 107 S. Ct. 403, 93 L. Ed. 356 (1986). Therefore, the district court's order below should not be reversed based upon the contention that Rite Aid failed to move to vacate the award within 30 days of its issuance, as that argument was not made to the district court. This is particularly so where enforcement of the award would require the employer to violate the National Labor Relations Act, and therefore the award cannot be enforced as a matter of law. See, e.g., Sperry Systems Management Div. v. NLRB, 492 F.2d 63 (2d Cir.) cert. denied sub nom., Local 445 Int'l Union of Elec., Radio & Mach. Workers v. Sperry Systems Management Div., 419 U.S. 831, 95 S. Ct. 55, 42 L. Ed.2d 57 (1974); International Union of Operating Eng'rs., Local 542 v. Evans Asphalt Co., Inc., 721 F. Supp. 73 (M.D. Pa.), aff'd, 891 F.2d 281 (3d Cir. 1989) (award will not be enforced despite fact that employer failed to move to vacate within 30 days).

The Union has also misstated (and apparently misunderstood) Rite Aid's contention as to why the award may not be enforced. Rite Aid has not engaged in "forum shopping", as alleged in the Union's Petition (at p. 9). The Union's grievances alleged violation of the contract, and the arbitrator had contractual authority to determine the existence of violations of the contract. It was, however, the particular award the arbitrator issued which was on its face contradictory to NLRB policy and the appropriate bargaining unit principles established under Section 9(b) of the Act, 29 U.S.C. §159(b). It was the arbitrator who determined that the CRW employees were to be incorporated into the collective bargaining unit, to be governed by the terms and provisions of the collective

bargaining contract. It was the arbitrator who determined that 27 CRW employees would now be represented by the Union, despite the fact that they had never indicated such a preference. Rite Aid cannot be faulted, as the Union seeks to do, for "allowing" the arbitration to take place and not seeking an injunction to avoid it, especially when there were several possible grounds for disposition of the grievances by the arbitrator. It was not until after his award was issued that Rite Aid was squarely confronted with the prospect of having to implement an unlawful unit determination, issued not by the NLRB, but rather by an individual who lacked legal authority to issue such an inappropriate determination.

This Court has explicitly recognized that an employer does not waive its right to contest a representational issue merely by having first participated in an arbitration. In Carey v. Westinghouse, the Court stated that arbitral awards "...may later end up in conflict with Board rulings...yet...the possibility of conflict is no barrier to resort to a tribunal other than the [NLRB]." The Court noted that arbitration was nevertheless to be encouraged, even as to representational issues:

> However, the dispute to be considered - whether one involving work assignment or one concerning representation - we see no barrier to use of the arbitration procedure...If it is a representation matter, resort to arbitration may have a pervasive, curative effect...The superior authority of the Board may be invoked at any time. Meanwhile, the therapy of arbitration is brought to bear in a complicated and troubled area.

Carey, supra, 375 U.S. 261, 272, 84 S. Ct. 401, 409 (emphasis added).

Accordingly, as the arbitrator's award unalterably conflicts with the NLRB decision, and as the latter must take prece-

dence under the Act and pursuant to the Supreme Court's "supremacy doctrine" referred to above, enforcement of the award would have placed the district court at odds with the federal agency entrusted exclusively by Congress with the task of making collecting bargaining unit determinations. Enforcement of the award would conflict with the NLRB determination, and thereby subject Rite Aid to two conflicting orders. In short, the Union's action for enforcement of the award was properly dismissed below as contrary to well-defined public policy, as expressed in the NLRB's interpretation of the Act and evidenced by its decision in Case 5-UC-275, its dismissal of the Union's charges in Case 5-CA-19968, and its issuance of a Complaint in Case 5-CB-6292.[3/] The Union's action for enforcement of the award was therefore properly dismissed below.

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[3/] It is itself a violation of the Act for a union to seek judicial enforcement of an arbitration award once the Board has already issued a contrary determination in a representation case. See, Sperry Systems Management Div. v. NLRB, 492 F.2d 63 (2d Cir.), cert. denied sub nom., Local 445 Int'l. Union of Elec., Radio & Mach. Workers v. Sperry Systems Management Div., 419 U.S. 831, 95 S. Ct. 55, 42 L. Ed.2d 57 (1974).

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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